IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2003

CORAM

THE HONOURABLE MR.JUSTICE S.R.SINGHARAVELU

Second Appeal No.700 of 1993

Duraikannu Padayachi ..... Appellant

-Vs-

Meera ..... Respondent

Appeal against the judgment and decree dated 25.09.1992 in A.S.No.19 4 of 1992 before the Additional Sub Court, cuddalore, preferred against the judgment and decree dated 16.03.1992 in O.S.No.11 of 1989 on the file of the Additional District Munsif's Court, Cuddalore.

!For Appellant : Mrs.Hema Sampath

^For Respondent : Mr.R.Yashod Vardhan

:JUDGMENT

The defendant has preferred this Second Appeal as against the decree for specific performance and possession of suit property, passed by the lower appellate Court, on reversal of the dismissal of the suit in the trial Court.

2.The averments found in the plaint are as follows:
The suit property originally belonged to Chandraraju pillai who on 0 9.05.1984 had executed a will in a sound disposing state of mind and the said will was duly executed and attested and it was his last will, as per the terms of which the plaintiff was given the suit property and another item with absolute right.
Chandraraju pillai died and the Will took effect. Even prior to the will, he had sold the property to the defendant by a registered sale deed dated 30.12.1983 for Rs.1,500/- and on the same day Chandraraju pillai and the defendant entered into an agreement of reconveyance as per the terms of which the former was entitled to get reconveyance within five years there from on payment of Rs.1,500/-. In the mean time as Chandraraju pillai died, the legatee under the Will, the plaintiff is entitled to get reconveyance.
Expressing her ready and willingness, the plaintiff issued a notice on 02.08.1988, calling upon the defendant to execute a sale deed. The same was served on the defendant on 03.08.1988. As defendant failed, the suit was filed for specific performance and possession.
3. The defendant filed the written statement with the following averments:

True it is that suit property orginally belonged to Chandraraju pillai and he had sold the same to the defendant on 30.12.1983 for Rs.1,5 00/-. It is untrue to say that there was an agreement of reconveyance and the said agreement is a rank forgery. The plaintiff is incompetent to file the suit as she is not the daughter of Chandraraju pillai. The alleged Will dated 09.05.1984 is also a forgery. It was not properly executed and duly attested. The original Will is not in the custody of the defendant. So, the suit is liable to be dismissed.

4. On the above pleadings, the following issues were framed by the trial Court:
(i) Whether the Will dated 09.04.1984 was true and legally sustainable?
(ii) Whether the agreement of reconveyance is legally sustainable?
(iii) Whether the plaintiff is entitled for the relief asked for?

5. The plaintiff and her mother were respectively examined as P.W.1 and P.W.2. The scribe and the attestor to the Will were examined as P.W.3 and P.W.7. The attestor and scribe of the agreement of reconveyance were examined as P.W.4 and P.W.5. P.W.6 is the attestor to another document. The defendant was examined as D.W.1. Exs.A.1 to A.8 were marked on the side of the plaintiff. Exs.B.1 which is the original of Ex.A.8 was marked on the side of the defendant.

6. On consideration of the entire oral and documentary evidence, the leanred trial Judge has come to the conclusion that the agreement of reconveyance executed by the defendant on 30.12.1983 in favour of Chandraraju Pillai was legally proved and that the Will dated 09.05.19 84 was not so proved. The learned trial Judge has dismissed the suit contending that the plaintiff had no right of reconveyance. The lower appellate Court has found that both the Will and the agreement of reconveyance were legally proved and that the paintiff was entitled for right of reconveyance and so decreed the suit, against which the second appeal lies.

7. During the time of admission, the following substantial questions of law were framed:

(i) Whether in law the courts below are right in finding that an unregistered alleged re-conveyance agreement could alter the terms of the registered sale deed, thus flouting Section 92(4) of the Evidence Act?
(ii) Whether in law the lower appellate court is right in holding that the will alleged to have been executed by the plaintiff's father is true and valid, when the original will has not been filed and when the will was not proved as required under law?
(iii) Whether in law the lower appellate Court is right in finding that the plaintiff could maintain the suit when even as per the alleged will, she would inherit the property only after her mother's lifetime?

8. Admittedly, the suit property measuring an extent of 33 cents in R.S.No.375/1 situate in Kodhandaramapuram of Cuddalore Taluk originally belonged to the deceased Chandraraju pillai who had admittedly executed a

registered sale deed through Ex.B.1 dated 30.12.1983 to the defendant for a sum of Rs.1500/-. Even according to the defendant who was examined as D.W.1, Chandraraju died five years back which takes us to 1987. Thangam was admittedly his first wife through whom a son Sadagopan was born. Admittedly Thangam also died later; whether she predeceased Chandraraju or died later is not made known. Plaintiff claims to be one of the two daughters of Chandraraju born through his second wife Sarasu examined as P.W.2.

9. According to Sarasu (PW.2), it was 30 years back, she married Chandraraju and the marriage ceremony had taken place at Nataraj Temple of Chidambaram; that both lived in Kattusalai as husband and wife and during their long wedlock Meera, the plaintiff and one Padmavathy were born; that Padmavathy is now dead leaving a daughter. The defendant in paragraph-4 of his written statement had contended that the plaintiff was not the daughter of Chandraraju pillai; that the later's wife was a different person and through her, he has got other Legal Representatives; and that the maternity of the plaintiff was not disputed. There is no plea or counter plea about the marrital status of Sarasu. Only in the course of evidence Sarasu as P.W.2 claimed that 30 years back, there was marriage between her and Chandraraju at Chidambaram Nataraja temple. The defendant while examined as D.W.1, felt ignorance as to whether Meera was born to Chandraraju Pillai. Even P. W.4 a close relative of Chandraraju and P.W.7, have deposed that plaintiff and Padmavathy were born to Chandraraju Pillai through Sarasu. Their specific evidence was that there was no marriage between Sarasu and Chandraraju Pillai. Although there is no evidence to prove the conduct of marriage between Sundararaj and sarasu, there is ample evidence to show their long cohabitation at Kattusalai. The defendant himself has admitted that they lived in Kattusalai for a long time. The defendant in the course of evidence stated that he did not know whether the plaintiff was born to Chandraraju Pillai,

whereby the plea in paragraph-4 of denial of paternity of plaintiff was diluted. Thus, it is found by long cohabitation with Sarasu, Plaintiff and Padmavathy were born to Chandraraju. This gives Sarasu status of second wife.

10. The plaintiff had filed the suit for specific performance based upon an agreement of reconveyance through Ex.A.5 said to have been executed by the defendant on the same day, namely 30.12.1983, when he purchased the suit property from the original owner Chandraraju. Since the execution of Ex.A.5 was specifically denied in the written statement, it is onerous on the part of the plaintiff to prove the same; for which she had examined the scribe Paramaswara iyer as P.W.5 and one attestor Narayanasamy as P.W.4, since the other attestor Ranganatha Pillai expired.

11. A careful perusal of both the above witnesses would go to show the execution of Ex.A.5. Although it is an unregistered agreement, both the courts below factually found the true and valid execution thereto. Both Ex.B.1 and Ex.A.5 were written on the same day by the same scribe and was attested by the same individuals and the price was also found the same in both. P.W.5 had emphatically contended that he saw the defendant signing Ex.A.5; of course, P.W.4 the attestor did not contend about this aspect.

Since the agreement is not a document legally required to be attested, the proposition that the evidence of scribe cannot be considered for the purpose of attestation becomes inapplicable here. Again the question that while Ex.B.1 was registered, why not the reconveyance of the same through Ex.A.5 was not registered may arise. The answer is that while a sale is required by law to be registered, an agreement is not required to be registered. Therefore, parties might have contemplated not to register Ex.A.5 and if an otherwise proved document which is not legally required to be registered may not fail on the ground of lack of registration. It is therefore, we find that Ex.A.5 was true and validly executed.

12. The plaintiff had based her right of reconveyance of suit property on the will dated 09.05.1984 under which she claims the suit property and another item was bequeathed. True it is that the Will includes the suit property and another 83 cents in some other survey number of the same village bequeathing an extent of acre 1.16 cents (including the suit property) not only to the plaintiff but also to her sister; and that too after the demise of Sarasu to whom the life estate was created. No right of reconveyance of suit property was included therein. The trial Court has dismissed the suit only on the ground that Meera got the right in the suit property under the Will only after the death of her mother, besides the fact that the Will was not proved. The Lower appellate Court while validating the Will has patently erred in appreciating the evidence of P.W.7, one of the attestors to the said Will. In order to prove the said Will, atleast one attestor has to be necessarily examined. P.W.7 is one such attestor. A careful perusal of his evidence will go to show that what he had spoken to was only about Ex.A.1 which is the registration copy of the Will which apparently may not contain the actual signature of the testator or attestor. The lower appellate court has committed an error by construing that what P.W.7 has deposed was by seeing Ex.A.2, the xerox copy of the Will which may contain the replica of the signatures of the testator and attestor. Since P.W.7 had only spoken about the Will by seeing the registration copy thereto namely Ex.A.1, there could be no identity of signatures made.

13. Regarding attestation, what is mentioned in Section 3 of the Transfer of Property Act is as follows:

"Attested" in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the excutant, or has received from the executant a personal acknowlegment of his singature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the time and no particular form of attestation shall be necessary."

14. Reliance was placed by the defendant in Govindan Chettiar Vs. Akilandam alias Seethalakshmi and 24 others reported in (1997 (3) L. W.673), wherein the following was observed:

"I have already said that the attesting witnesses in this case have not identified the signautre of the deceased, nor the attestation by them. They only give a general statement about the procedure of attestation. When the signatures of the testator and the attestors are not idendified, it cannot be said that the Will is properly proved. In 1996-II-M.L.J 596 (Suguna Bai v. Muniammal @ Dhanalakshmi and others), I had occasion to consider a similar question. In Paragraph 18 of the judgment, I have held thus:

"Even though D.W.5 speaks that he is an attestor when he was examined, I do not find that the Will is shown to him and the signatures of the various attestors or the testator are identified by him. ..... He must identify the signature as seen in the document."
Applying the above principle of law as there was no identifiation of signature made, there was no proper proof of the execution of the Will.

15. The non-production of the original of the Will also may go against the proof of the same along with other facts in this case. The pleadings in the plaint was as if the defendant is witholding the original of the will. P.W.2 also said so in her evidence. But the plaintiff in her evidence, had deposed as if the original Will was available with the mortgagee Ramalingam, perhaps referring to the vendee under Ex.A.3, who before purchase has got some mortgage right over the property mentioned in the Will excepting the suit item. Thus, there is inconsistency in the case of the plaintiff and varied versions as to the availability of the original will. No attempt was taken to have summoned anyone concerned. It is not also the case of the plaintiff that they have lost the will.

16. Reliance was placed in Arulmighu Vedaranyeswaraswami Devasthanam Vs. Vedaramyam reported in (2000(1) CTC 534) by the defendant and the following portion was pointed out therein:
"Under Section 65 of the Evidence Act, secondary evidence is permissble only when the conditions set out in the said section are satisfied. It is not the plaintiffs' case that the original is in possession of person against whom, the document is sought to be proved, or that it is in the possession of a person out of reach. Nor it is sated that it is in the possession of the person who is not subject to the process of the Court. It is also not stated that it is in the possession of a person who is not legally bound to produce it, and even after the notice mentioned under Section 66, such person failed to produce it. It is also not the case that the original has been destroyed or lost. Nor it is the evidence of the plaintiff that the non production is on account of any other reason not arising from his own default or neglect. When the conditions laid down in Section 65 of the Evidence Act are not satisfied, in the face of the evidence of P.W.1, the courts below erred in accepting the secondary evidence of the said document. Moreover, the courts below applied the presumption arising under Section 90 of the Act. The presumption will arise only when it is produced from proper custody. As to the proper custody, the plaintiffs have not adduced any evidence. The evidence adduced does not advance the case of the plaintiffs with regard to proper custody. Further, what is produced is only a certified copy. The presumption arising under section 90 of the Act cannot be applied to a certified copy. Therefore, both the courts erred in holding that the

will has been proved and that it is binding upon the defendants....."
Thus, the non production of the original of the Will affects the case of the plaintiff.
17. That apart, the testator after having executed the sale deed under Ex.B.1 dated 30.12.1983 to the defendant in respect of the suit property had subsequently become incompetent to bequeath the same property on 09.05.1984 through Ex.A.1 Will in favour of the plaintiff. Thus, for want of capacity also the Will suffers in respect of the suit property. Regarding the

other properties dealt with under the Will, it was not proved by effective examination of attestor and also by production of the original Will. For the reasons mentioned supra, the Will is found not proved.

18. After eschewing the Will as not proved, what is remaining is the admitted execution of Ex.B.1 and the finding that the execution of A.5 as true. Thus, Chandraraju had a right of reconveyance over the suit property. As the Will did not contain the right of reconveyance of the suit property and also as the Will itself was found unproved, the right that had flown under Ex.A.5 to Chandraraj will devolve only by intestate method. In that event, there were by then two wives, two daughters and one son each entitled to 1/5th share. Whether the right of reconveyance is divisible as above or indivisible like a mortgage right is to be seen. Plaintiff has preferred to file the suit by herself within the period of five years stipulated under Ex.A.5, the agreement of reconveyance power to have been executed by the defendant. To the above question of indivisibility of the jointly interested promisees who had inherited the right of reconveyance from the original sole promisee, Court have consistently held only in the affirmative.

19. The learned counsel for the plaintiff had drawn the attention of this court to Section 15 of the Speficic Relief Act which reads as follows:
"15. Who may obtain specific performance: Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by--

(a) any party thereto;
(b) the representative in interest or the principal, of any party thereto;

20. Reliance was placed by the plaintiff in Radhabai Vs. Parwatibai reported in (AIR 1970 Bombay 275). In that case one Doma had filed a suit for specific performance of an agreement of sale entered into by the defendant with him. The defendant on 07.05.1965 entered into an agreement to sell a house in Circle No.4/6 at Nagpur to the original plaintiff Doma and accordingly the defendant had executed an Isarchitti on the same date. The Isarchitti recites that the defendant had received a sum of Rs.500 as part payment of the purchase price of Rs.1 0,750, and that the sale deed was to be executed within four months from the date of the agreement. Doma filed a suit on 23.09.1965 asking for specific performance of the agreement dated 07.05.1965. Doma died on the same day after the suit was filed and leaving

behind his widow Gaurabai and his married daughter Parwatibai. After the suit was filed on 23.09.1965, when it was fixed for further orders on 28.09 .1965, Parwatibai filed an application under Order 22 Rule 3 CPC, stating that she was the sole surviving heir and legal representative of her deceased father, the original plaintiff, and that she was entitled to be made a party in place of the deceased plaintiff, and that application was allowed. On 24.08.1966, the defendant filed an application under Order 14, Rule 1 CPC, alleging that the deceased Doma had already left behind his widow Gaurabai and latter was not brought on record, Parwathibai alone was not competent to maintain the suit. In reply, Parwathibai stated that the widow Gaurabai did not want to claim any share in the property in dispute. Gaurabai also filed an affidavit to that effect. Thereupon the preliminary issue was framed to the effect that whether the plaintiff, the daughter of late Doma had no locus standi to continue the suit as she was not the only heir of Doma. The issue was found in favour of the plaintiff.

21. On appeal to the High Court, it was contended that Doma having left two legal representatives, the daughter alone was entitled to continue the suit originally filed by the deceased Doma. For this proposition, reliance was placed upon (i) ILR 1941 Nagpur 615, and (ii) AIR 1960 Culcutta 187. By distinguishing these two cases, it was held in the above cited case law in Radhabai Vs. Parwatibai (AIR 1970 Bombay 275), that by a combined reading of Section 15 of Specific Relief Act, 1963 and Order 22, Rule 3 CPC, that since Gaurabai on her own affidavit disclaimed all interest in the transaction between the defendant and the deceased Doma and it was evident that Doma himself had intended to purchase a suit house for the benefit of Parwatibai, the objection regarding the absence of the widow as a legal representative on record was considered purely a technical objection without substance and it was overrulled; thus disallowing the case putforth by the defendant that in the absence of widow of Doma, the suit cannot proceed and must be taken to have abated as a whole.

22. Unlike the above cited case, in this case, the provision under Order 22, Rule 3 CPC will not come into picture here, because the present suit was not filed by the original vendor with right of reconveyance, namely Mr.Chandraraju. He died even prior to the filing of the suit and on his death, by way of testamentory succession, the plaintiff herself had preferred the suit. Since I found that the Will was not proved and that it did not include the right of reconveyance which right the testator had, there could only be intestate succession regarding the right of reconveyance. In that event, all the legal heirs of deceased Chandraraju should have been arrayed atleast as defendants, if they dissented to get them added as plaintiffs. Among the jointly interested legal heirs of the deceased sole promisee, one only cannot maintain a suit without impleading the others at least as defendants.

23. Girdhar Vs. Motilal Champelal reported in (ILR 1941 Nagpur 615) = (AIR 1941 Nag (5) was a case where the suit was a mortgage suit. The plaintiff therein had obtained through an assignee the mortgagee' s right by purchase. It was in conjunction with two persons Premraj and Dhanraj and as Premraj died, the estate went to Dhanraj and Gulabchand. In that case, the

plaintiff's pleader refused to join these two persons as parties and the suit was dismissed for non-joinder of parties holding that a morgage being indivisible, the suit based on a mortgage must be dismissed in its entirety if all the parties entitled to a share in the money due on the mortgage were not impleaded.

24. The facts of the case in Smt. Katip Bibi Vs. Fakir chandra Ghosh reported in (AIR 1960 Culcutta 187), is that there was a contract of reconveyance entered into by the predecessor in interest of defendants 1 to 3 in favour of Rostam Ali who was the original vendor of the same property and the said agreement was to reconvey the property either to Rostam Ali or to his heirs or legal representatives. On the death of Rostam Ali, only one of the heirs being her daughter brought the suit claiming specific performance. Both the lower courts dismissd the suit finding that the agreement of reconveyance being to the effect that the reconveyance was to be made to the vendor or to his heirs and to his representatives, the entire parties or the legal heirs and not only one of them entitled to bring the suit for specific performance on the death of the original vendor. It was held in the second appeal that when there were several joint promisees and espicially when some of them were not shown to have joined as plaintiffs, the dismissal of the suit was inevitable. While discussing this aspect, it was mentioned in Radhabai Vs. Parwatibai reported in AIR 1970 Bombay 275, that if there was material on record which would indicate that persons who had been joined as defendants had refused to join as plaintiffs, it might not have necessarily involved the dismissal of the suit. From this, it is evident that all the heirs should have been brought on record atleast as defendants if they have dissented to be added as plaintiffs.

25. "The Allahabad High Court in Sheomurat Ram v Savitri (MEHROTA, J) AIR 1977 All 322 has taken the view that "while it is necessary that all the parties should be before the Court so that it may be in a position to grant the necessary relief, it is not necessary that the parties should be arrayed on the side of the plaintiff. Some of them can be put in the array of the defendants if they refuse to join as co-plaintiffs. If this were not the correct position, it would be open to one or the other of several legal representatives to defeat the claims of the remaining legal representatives to seek relief against the promisor. Under Or.1, r.10, CPC the Court can always transpose the parties".

"The learned Judge also observed that the Court should not therefore insist on evidence being produced to substantiate that those who have been joined as co-defendants had categorically refused to join as co-plaintiffs. Further, joint interest can arise in various circumstances. For example, there can be joint promisees at the inception of the contract. Joint interest can also arise on account of the death of a sole promisee who leaves behind several legal representatives to survive him and they can be described as jointly interested in the claima to which their predecessor-in-interest as the sole promisee was entitled. "The view of the Calcutta High Court is, therefore, directly opposed to Amina Bibi vs Abdul Kader Saheb(25 Mad 26); Abdul Shaker Sahib vs Abdul Rahiman Sahib (AIR 1923 Mad 284); Jagdeo Singh vs

Bishambhar (AIR 1937 NAG 186) and Monghibai vs Cooverji Umersey (AIR 193 9 PC 170)".

26. The above proposition was found at Page 107of Goyle's Law of Specific Performance Third Edition (Eastern Law House).

27. Therefore, it becomes imperative on the part of all the heirs of Chandraraju to have jointly filed the suit for getting the right of reconveyance exercised in their favour, as it has not been done and as the Will was also found not proved, the suit has to fail.

28. In the result, the second appeal is allowed and the suit is dismissed. No costs.

Index:Yes
Web site: Yes
sr
To
1. The Additional Sub Court, Cuddalore,
2. The Additional District Munsif's Court, Cuddalore.